

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

ROCKAWAY BEDDING CO., INC.

Employer

and

Case 4–RC–20267

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 384

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer, a New Jersey corporation, operates approximately 155 retail mattress stores encompassing nine districts and covering six Mid-Atlantic states. The parties

stipulated that a unit consisting of sales managers, assistant managers, sales associates and trainees is appropriate. However, they disagree as to the scope of the unit. Petitioner seeks to represent a unit of approximately 68 Sales Managers, Assistant Managers, Sales Associates and Trainees¹ in the 36 stores comprising Districts 7 and 8. District 7 and 8 are located in Eastern Pennsylvania (including Philadelphia and surrounding suburbs) and Northern Delaware. Alternatively, the Petitioner is willing to proceed to an election in separate units in Districts 7 and 8, which would contain approximately 39 and 29 employees, respectively. The Employer takes the position that only an employer-wide unit covering all of its approximately 300 sales professionals in all 155 stores throughout its nine districts is appropriate.

The Employer's corporate office is located in Randolph, New Jersey. The overwhelming majority of its retail stores are located in New Jersey, New York and Pennsylvania.² During the past two years, the Employer has expanded from 110 to approximately 155 stores.

Mark Musilli is the Employer's Director of Store Operations. From his office in Randolph, New Jersey, Musilli oversees the operation of all 155 retail stores. District Managers supervise sales professionals at the retail stores.³ Musilli reports to Jeff Bonham, the Employer's Vice President. Musilli, Bonham and Bud Metz, the Employer's Director of Human Resources, formulate and disseminate all policies and procedures for sales professionals. These policies, which include information on compensation, opening and closing procedures, benefits and employee responsibilities, are compiled in an Employee Handbook distributed to new hires. These policies govern the terms and conditions of employment at all 155 retail stores.

The Employer's operations are structured administratively by district. While districts do not correspond to pre-determined geographical boundaries, districts are based on the residence of District Managers. For example, District 7 consists of 21 stores and is located in Eastern Pennsylvania; its District Manager resides in Bath, Pennsylvania. District 8 consists of 18 stores located in Philadelphia and surrounding suburbs in Pennsylvania and Northern Delaware; its District Manager resides in Northern Delaware. The Employer established this administrative structure to enable District Managers to maximize efficiency and effectiveness in performance of their daily oversight function over the stores, and to maximize their ability to monitor sales performances and solve problems within their districts.

The record evidence shows that some stores have been reassigned from one district to another. In 2000, the Employer created District 9 because it acquired a chain of stores in Delaware and Maryland, and expanded one of the New Jersey districts because it purchased several stores in the New York area. Several stores formerly in Districts 7 and 8 were added to the newly created District 9. Sales Associate Lloyd Moll testified that on a separate occasion, the Audubon, Pennsylvania store where he worked was reassigned from District 8 to District 7. In addition, in 2000, several stores formerly in District 7 were reassigned to a central New Jersey district because a newly selected District Manager began working in that geographical area. A

¹ These individuals will collectively be referred to as sales professionals. Sales associates are also referred to as "floaters."

² There are two stores in Connecticut, one store in Maryland, and eight stores in Delaware.

³ The parties stipulated that District Managers are supervisors within the meaning of Section 2(11) of the Act.

personnel change in District 6 is currently being contemplated which the Employer believes will lead to reconfiguration within that district.

Sales professionals staff the Employer's retail stores. Sales managers and assistant managers are assigned to a specific store and experience little interchange with other stores. They perform the same job duties but receive different rates of pay. Sales associates and trainees perform the same duties as sales managers and assistant managers, except they do not open and close the stores. The record does not indicate the pay rates of the sales associates or trainees. Depending on sales volume, stores may be staffed by one or more sales professional. High volume stores may employ a sales manager, an assistant manager and an associate or trainee. Sales professionals work a five-day week. There is one shift per day and the stores are open seven days per week. Sales associates cover the two days when a sales manager or assistant manager is not at his/her assigned store.

District Managers are responsible for the day-to-day operation of the stores within their respective districts. District Managers provide sales employees advice and instructions on sales techniques and customer service and solve daily sales problems. While the District Managers prepare weekly work schedules for the sales professionals, the schedules are sent to the corporate office for approval. The corporate office reviews the schedules to assure adequate coverage. The schedules are rarely revised. Sales professionals submit vacation requests to their District Managers, who approve or disapprove the requests based on staffing needs. The requests are forwarded to the central office, as District Managers do not have access to records showing whether employees have earned enough vacation hours to grant their request.⁴ The central office rarely overrules the vacation request decisions made by the District Managers. Similarly, sales professionals seek approval for sick time from District Managers, and only contact the central office on this request if the District Manager is absent. Sales professionals report unsafe working conditions and on-the-job injuries to the District Managers.

While District Managers interview applicants for hire, and make recommendations for hire, the central office retains the authority to hire employees. District Managers can recommend discharges and promotions and their recommendations are "taken seriously" by the central office.⁵ District Managers have no authority to change wage rates, sales commissions or benefit levels of sales professionals. These are determined by formulas devised by officials in the central office. District Managers conduct eight-week training sessions for each new employee within their districts, utilizing training manuals prepared by the corporate office.

Director of Store Operations Musilli encourages District Managers to convene district-wide meetings generally to provide a forum for inspiring improved sales performance. There is no standard number of meetings in each district, although District 8 regularly holds one meeting per month. District meetings are reserved for personnel of that particular district. In addition to these meetings, corporate headquarters convenes two or more product introduction

⁴ District Managers maintain no offices. They work from their homes or automobiles, and communicate with the central office by mobile phone or electronic transmission.

⁵ The record does not indicate the meaning of "taken seriously."

meetings per year. These meetings, which showcase a manufacturer's newest product line, do not follow district lines, but are held in four or five central locations to make it convenient for sales professionals from several districts to attend. Sales professionals may choose to attend a session in any location.

As a general rule, employees of a district will interact only with their own District Manager, and not those of other districts.⁶ Sales managers and assistant managers are assigned permanently to a store. They are generally not transferred involuntarily. Sales associates and trainees fill in at stores within their assigned district on an as-needed basis. Rarely will they transfer outside their assigned district, and then only temporarily. Whenever there are absences resulting in a lack of coverage at a specific store, the District Manager looks to his or her district sales force for replacements. Only where this step fails will the District Manager, with the support of the corporate office, look to other districts. Lloyd Moll, who served as a Sales Manager in District 7 and 8, testified that sales associates only worked outside their home district during one percent of their work time. While the record does not indicate the number of permanent transfers within districts, these transfers are rare and are caused only when employees change their residences.

In *Overnite Transportation Co.*, 322 NLRB 723 (1996), the Board, in reviewing the principles underlying its determination of appropriate units, stated:

In deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate. *P.J. Dick Contracting*, 290 NLRB 150 (1988). The Board, however, does not compel a petitioner to seek any particular appropriate unit. The Board's declared policy is to consider only whether the unit requested is an appropriate unit for collective bargaining. *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964). There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act only requires that the unit be 'appropriate.' *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951); see *Staten Island University Hospital v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994); see also *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991), interpreting the language of Section 9(a) as suggesting that employees may seek to organize a unit that is appropriate—not necessarily the single most appropriate unit. A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer unless an appropriate unit compatible with that requested unit does not exist.

⁶ Employees have limited daily contact with the central office, as they send electronic mail communications there to assure the central office that a store is adequately covered. If problems arise concerning coverage, the central office notifies District Managers and expects them to resolve the problems.

While a single facility unit is presumptively appropriate, there is no such presumption in situations such as the instant case where the petitioner seeks to represent employees at multiple facilities. See *Capital Corp. Co.*, 309 NLRB 322, n.1 (1992) and cases cited there. Whether a unit consisting of two or more retail establishments in an employer's retail chain is appropriate will be determined in light of all the circumstances of a particular case. *Sav-On Drugs, Inc.*, 138 NLRB 1032 (1962). In such cases, the Board focuses on whether the community of interest in a petitioned-for unit is distinct from the community of interest which those employees share with the remaining employees of the employer. *Acme Markets, Inc.*, 328 NLRB 1208, 1209 (1999).

In the instant case, I find that the Petitioner has failed to establish that sales professionals share a distinct community of interest in Districts 7 and 8, the combined unit for which it petitioned. There is no administrative structure corresponding to the two districts together. Nor is there any showing that the two districts share common supervision. While some evidence of temporary inter-district transfers was presented, there is no indication that Districts 7 and 8 interchange employees any more frequently than other district pairs. Rather, the grouping of District 7 and 8 represents an arbitrary segregation of employees and is not an appropriate unit for purposes of collective bargaining. *Acme* supra at 1209.

However, the record demonstrates that a distinct community of interest exists among the sales professionals separately in Districts 7 and 8, the units alternatively proposed by the Petitioner. In this regard, the record shows that the Employer's basic administrative units are its districts, and separate bargaining units in Districts 7 and 8 conform to that structure. The District Managers provide district employees with day-to-day directions and oversee their performance. District Managers schedule district employees and preliminarily approve requests for vacation and sick leave. These managers screen applicants for hire and recommend promotions and termination of district employees. District Managers conduct training and conduct district-wide meetings. The fact that the central office reviews schedules and vacation requests and that District Managers have limited personnel authority does not detract from the conclusion that district employees enjoy a distinct community of interest from the community of interest which they share with all of the Employer's sales professionals in its nine districts. *D&L Transportation, Inc.*, 324 NLRB 160 (1997); *Esco Corporation*, 298 NLRB 837, 839 (1990) (unit appropriate even though individual who oversees operations not a statutory supervisor).

Also, the amount of employee interchange between facilities, a critical factor in the determination of the appropriateness of a localized unit, favors units by district. *Sav-On Drugs*, supra and *Esco* supra. In the instant case, there is minimal interchange of sales professionals across district lines. Even considering the shifting boundaries of districts, where reconfigurations such as those that occurred in 2000, in effect, "transfer" a number of sales managers and assistant managers to a new district, the interchange of employees does not rise to a level which would destroy a district's identity. See *Burlington Food Stores*, 235 NLRB 205 (1978).

While the Employer asserts that the shifting boundaries of the districts requires an employer-wide unit, the record does not establish that these shifts occur with such frequency so as to find that meaningful bargaining could not occur in district-wide units. There have been

only four such shifts in the past 2 years and only one shift is contemplated in the near future. These shifts, which affect only a small percentage of the Employer's 155 retail stores, do not establish that district structure is so amorphous as to impede meaningful collective bargaining. See *Burlington Food Store*, supra (petitioned-for unit inappropriate where numerous boundary shifts into and out of unit; alternative unit appropriate where such shifts occasional).

The record demonstrates that a single district is an appropriate unit for purposes of collective bargaining. The fact that an employer-wide unit may also be appropriate or that it might be the most appropriate unit does not alter the conclusion that the Petitioner's request to proceed to election in separate units of Districts 7 and 8 is appropriate. *Overnite Transportation*, supra. Other arguments advanced by the Employer do not produce a contrary result. *Acme Markets*, supra heavily relied on by the Employer, is inapposite. Unlike that case, the units found appropriate here conform to an existing administrative structure. Finally, the geographic distance between the northern-most store and the southern-most store militates against an employer-wide unit. While a precise separation in terms of mileage is not referenced in the record, the Employer's sales operations span six states, from Connecticut to Maryland, and this distance is a strong factor countervailing the Employer's contention. See e.g., *Bowie Hall Trucking, Inc.*, 290 NLRB 41 (1988); *Esco Corp.*, supra.

Based on the foregoing, I find that the record establishes that employees in Districts 7 and 8 separately share respective communities of interest. Accordingly, I find that the following units sought by the Petitioner are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Sales Managers, Assistant Managers, Sales Associates and Trainees employed by the Employer in its District 7 stores, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time Sales Managers, Assistant Managers, Sales Associates and Trainees employed by the Employer in its District 8 stores, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently,⁷ subject to the Board's Rules and Regulations. Eligible to vote are those in the

⁷ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

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LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that **a separate election eligibility list for each of the units**, containing the **full** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The lists must be of sufficiently large type to be clearly legible. I shall, in turn, make the lists available to all parties to the election. In order to be timely filed, such lists must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **November 30, 2001**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted by facsimile transmission. Since the lists are to be made available to all parties to the election, please furnish a total of **3 copies** of each list, unless the lists are submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **November 6, 2001**.

Signed: October 23, 2001

at Philadelphia, PA

/s/

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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